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In The Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES,

Petitioner,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Just Compensation Clause of the Fifth Amendment permit Wisconsin to use the "undivided-fee" rule to completely deny a leaseholder any compensation whatsoever for the taking of its property?

2. Does the Due Process Clause of the Fourteenth Amendment allow states to deny owners any compensation whatsoever for the taking of their property without allowing them to present any evidence of its value?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a non-profit, public interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights.

IJ is the nation's leading legal advocate against the abuse of eminent domain. IJ represented the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005) and in many other federal and state eminent domain cases throughout the country. In its work representing and assisting condemnees, IJ has seen the profound effects of eminent domain on businesses and institutions that lease their premises. It has seen, too, the lack of uniformity in the treatment of condemnees and how that affects their continued survival. IJ therefore has an interest in the development of a consistent rule of law on what constitutes just compensation, so that courts can

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

protect people, businesses, and institutions that are forced to undergo eminent domain.

STATEMENT OF THE CASE

The *Amicus Curiae* incorporates by reference the description of the facts outlined in the petition for writ of certiorari. Pet. for Cert. at 6-10.

REASONS FOR GRANTING THE PETITION

This case presents an excellent opportunity for this Court to address an important unresolved issue of constitutional law, one that has caused a deep division among state supreme courts. The question is the status of the "undivided-fee" rule under the Just Compensation Clause of the Fifth Amendment. The rule, sometimes also referred to as the "unit rule," holds that when a property in which more than one owner has an interest is condemned, compensation will be awarded as if the land in question belonged to only one person.

Some state supreme courts have applied this rule categorically, others reject it, and still others have accepted it only partially. Overall, some twenty-eight state supreme courts have ruled on the question, as have several federal circuit courts. Their approaches

vary greatly.[2] This split of authority has led to enormous confusion and regional variation over an important constitutional issue.

The application of the undivided-fee rule in many states severely undermines the constitutional property rights of leaseholders that hold interests for which they pay below-market rent. Such arrangements are especially common among non-profit organizations and charities, including churches. Non-profits often rent property for below-market rent when landowners are willing to allow them to do so out of charitable impulses. Relatively poor and politically weak non-profits are especially vulnerable, since such organizations are often targeted for condemnation by local governments seeking to increase tax revenue or satisfy the demands of politically influential interest groups that covet their land. Small businesses also often lease property at below-market rates, as do many poor individuals who obtain such arrangements with the aid of charities or government agencies.

The use of the undivided-fee rule also often leads to the troubling result that owners of leasehold interests get little or no compensation for the loss of their property. It severely undermines the long-standing principle that "'[j]ust compensation' . . . means in most cases the fair market value of the property on the date it is appropriated." *Kirby Forest*

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[2] See cases cited in Part I, *infra*.

Indus. Inc. v. United States, 467 U.S. 1, 10 (1984) (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979)).

The rule further runs counter to the principle that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). When a property owner is denied compensation for the taking of his property because of the undivided-fee rule, he is unquestionably "alone . . . bear[ing] a public burden." *Id.*

The Court should also grant a writ of certiorari on the Veterans of Foreign War's Due Process Clause claim. By holding that the VFW had no right to present evidence of the value of their condemned property, the Wisconsin Supreme Court went against Supreme Court precedent and created a split of authority with the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I. THERE IS A MAJOR SPLIT OF AUTHORITY BETWEEN THE HIGHEST COURTS OF NUMEROUS STATES, AND SEVERAL FEDERAL COURTS OF APPEAL.

State supreme courts and several federal circuit courts are deeply divided over the application of the

undivided-fee rule in takings cases. Sixteen state supreme courts and lower courts in two other states apply the undivided-fee rule rigidly, as the Wisconsin Supreme Court did in the present case.[3] By contrast, six state supreme courts and the United States Court of Appeals for the District of Columbia Circuit, have held that it violates the Just Compensation Clause.[4]

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[3] *Harco Drug, Inc. v. Notsla, Inc.*, 382 So. 2d 1, 6 (Ala. 1980); *Nat'l Adver. Co. v. State*, 611 So. 2d 566, 569 (Fla. Dist. Ct. App. 1992); *City & County of Honolulu v. Market Place, Ltd.*, 517 P.2d 7, 14 (Haw. 1973); *City of Chicago v. Anthony*, 554 N.E.2d 1381, 1384 (Ill. 1990); *State v. Montgomery Circuit Court*, 157 N.E.2d 577, 578 (Ind. 1959); *Moore v. Kan. Tpk. Auth.*, 317 P.2d 384, 390 (Kan. 1957); *Commonwealth v. Sherrod*, 367 S.W.2d 844, 848 (Ky. 1963); *State v. D&J Realty Co.*, 229 So. 2d 344, 347 (La. 1969); *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (Mass. 1911); *State Highway Comm'r v. Woodman*, 115 N.W.2d 90, 92-93 (Mich. 1962); *County of Hennepin v. Holt*, 207 N.W.2d 723, 727 (Minn. 1973); *Lennep v. Mississippi State Highway Comm'n.*, 347 So. 2d 341, 343 (Miss. 1977); *N.J. Sports & Exposition Auth. v. Borough of East Rutherford*, 348 A.2d 825, 829-30 (N.J. Super. Ct. Law Div. 1975); *Arlen of Nanuet, Inc. v. State*, 258 N.E.2d 890, 893 (N.Y. 1970); *Hughes v. City of Cincinnati*, 195 N.E.2d 552, 556 (Ohio 1964); *State v. Mehta*, 180 P.3d 1214, 1220 (Okla. 2008); *City of Greenwood v. Psomas*, 155 S.E.2d 310, 313 (S.C. 1967); *State v. Brown*, 531 P.2d 1294, 1295 (Utah 1975); *State v. Cooper*, 162 S.E.2d 281, 284-85 (W.Va. 1968); *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 768 N.W.2d 749, 759 (Wis. 2009).

[4] *Arkansas State Highway Commn. v. Fox*, 322 S.W.2d 81, 82-83 (Ark. 1959); *United States v. Seagren*, 50 F.2d 333, 335 (D.C. Cir. 1931) (appeal from the Supreme Court of the District of Columbia); *City of Des Moines v. Housby-Mack, Inc.*, 687 N.W.2d 551, 553 (Iowa 2004); *City of Baltimore v. Latrobe*, 61 A. 203, 206 (Md. 1905); *State v. Platte Valley Pub. Power &*

(Continued on following page)

Finally, courts in several states (including six state supreme courts),[5] as well as five federal circuit courts,[6] use the undivided-fee rule as a rule of convenience but depart from it when it would lead to inadequate compensation.

In deciding whether to grant the writ of certiorari, this Court gives preference to cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a

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Irrigation Dist., 23 N.W.2d 300, 311-12 (Neb. 1946); *Garella v. Redevelopment Auth* , 196 A.2d 344, 348 (Pa. 1964).

[5] *Alaska State Housing Auth. v. DuPont*, 439 P.2d 427, 431 (Alaska 1968); *People ex rel. Dep't of Pub. Works v. Lynbar, Inc.*, 62 Cal. Rptr. 320, 327 (Cal. Ct. App. 1967); *State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 82 (Mo. 1930); *State v. Hy-Grade Auto Court*, 546 P.2d 1050, 1053-1054 (Mont. 1976); *State v. Cowan*, 103 P.3d 1, 4 (Nev. 2004); *State v. Burk*, 265 P.2d 783, 801 (Ore. 1954); *Gallatin Hous. Auth. v. Chambers*, 362 S.W.2d 270, 275-76 (Tenn. Ct. App. 1962); *State v. Ware*, 86 S.W.3d 817, 824 (Tex. App. 2002); *State v. Spencer*, 583 P.2d 1201, 1205 (Wash. 1978).

[6] *United States v. 6.45 Acres*, 409 F.3d 139, 147-48 (3d Cir. 2005) (holding that the rule is not "to be applied rigidly"); *United States v. 499.472 Acres*, 701 F.2d 545, 549 (5th Cir. 1983) (holding that "where required by the special circumstances of the case" unit rule need not be used); *United States v. Corbin*, 423 F.2d 821, 828 (10th Cir. 1970) (finding that "the aggregation of the values of the separate components seems to be the most logical manner of stating the ultimate award"); *United States v. City of New York*, 165 F.2d 526, 528 (2d Cir. 1948) (L. Hand, J.) (noting that the unit rule is not authoritative); *Nebraska v. United States*, 164 F.2d 866, 868-69 (8th Cir. 1947) (holding that the "rule is not . . . autocratically absolute").

United States court of appeals." SUP. CT. R. 10(b). It is difficult to imagine a more extensive and confusing split among lower courts over "an important federal question" than this one. Some twenty-eight state supreme courts and six federal circuit courts have ruled on the issue. They have come up with at least three distinct approaches.

In the present case, the Wisconsin Supreme Court acknowledged that "[s]everal courts in other states have, as the VFW urges, departed from the unit rule when the aggregate value of partial interests in the condemned property exceeds the value of an undivided interest." *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 768 N.W.2d 749, 760 (Wis. 2009). It cited some of the numerous divergent cases from other jurisdictions. *Id.* at 760-61.

The discord in the states over this issue undermines the crucial function of the Constitution as a uniform national baseline of fundamental rights that all states must respect. As Justice Joseph Story explained, one of the most important reasons why this Court has ultimate jurisdiction over federal constitutional issues is "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.) (emphasis in original).

Uniformity with respect to the Just Compensation Clause of the Fifth Amendment is particularly important because this Court has long emphasized the essential nature of this provision. It has refused to defer to state governments in setting compensation, even as it has given them more leeway on other issues related to the Takings Clause. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 488-90 (2005) (refusing to "second guess" state determinations that a particular taking serves a "public purpose" sufficient to justify condemnation under the Public Use Clause). As Professor James W. Ely, Jr., a prominent historian of constitutional property rights points out, "[f]ederal courts have long insisted that the determination of just compensation for a taking of property is a judicial, not a legislative, responsibility." James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 63. Since at least the Nineteenth Century, this Court has emphasized the importance of uniformity in this area, and the minimal scope of deference due to state and federal legislative decisions regarding compensation:

> It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

Just as legislatures cannot determine "what shall be the rule of compensation" under the Fifth Amendment, *id.*, state courts also cannot create wildly inconsistent rules of compensation under the Fifth Amendment. The Constitution cannot tolerate such profound divergence in the application of a crucial principle of the Bill of Rights.

The present case is an excellent vehicle for resolving this ambiguity because the facts are extremely clear. "[I]t is undisputed that the leasehold interest [that the VFW lost to condemnation] is of great monetary value." *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 746 N.W.2d 536, 543 (Wis. Ct. App. 2008), *rev'd*, 768 N.W.2d 749 (Wis. 2009). And there is no doubt that compensation was denied because of the Wisconsin Supreme Court's application of the undivided-fee doctrine.

II. THE RESOLUTION OF THIS ISSUE IS IMPORTANT TO NUMEROUS NON-PROFIT, SMALL BUSINESS, AND LOW-INCOME LEASEHOLDERS AROUND THE COUNTRY.

The application of the undivided-fee rule to cases like this one imperils the interest of many leasehold owners around the country. Non-profit organizations,

small businesses, and other leaseholders lacking in political influence are particularly at risk.

It is common for non-profit organizations such as churches, charities, and veterans groups (including the VFW) to rent property at rates below-market value; sometimes, they are able to rent for a merely nominal price, as occurred in the present case where the VFW paid only $1 per year in rent for the lease in question. Landowners frequently donate below-market value leases to such organizations out of charitable impulses, or even allow them to rent land virtually for free.[7] The same is also true of low income

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[7] *See, e.g.*, Peter Goonan, *Social Center Signs $1 Lease*, THE REPUBLICAN (Springfield, Mass.), Feb. 23, 2010, *available at* http://www.masslive.com/springfield/republican/index.ssf?/base/news-27/126691523080170.xml&coll=1 (non-profit community organization gets $1 per year annual rent for valuable property in Springfield, Massachusetts); Larry Rohter, *Avant Garde Film Group Gets New Home, Cheap*, N.Y. TIMES, May 27, 2009 (heavily discounted lease for non-profit Film-Makers' Cooperative in New York City); Kimbriel Kelly, *Native American Art Gallery Proposed*, CHI. DAILY HERALD, Sept. 15, 2004, at C5 ($1 per year lease for non-profit art gallery); *OU Trustees Approve Controversial $1 Lease For Retirement Community Site*, ATHENS NEWS (Athens, Ohio), June 27, 2004 ($1 per year lease on an 80 acre property for non-profit retirement community), *available at* http://www.athensnews.com/news/local-news/14586-ou_trustees_
approve_controversial_1_lease_for; Alex Hummel, *Vet Museum Start Pushed Back*, OSHKOSH NORTHWESTERN (Oshkosh, Wis.), Aug. 4, 2003, at 1C ($1 per year 99 year lease for non-profit veterans museum).

renters who sometimes get below-market leases with the aid of charities or government agencies.[8]

Small businesses also often secure below-market rents. *Amicus* Institute for Justice is aware of many situations where a small business operates under a favorable lease because the business spotted an up-and-coming area before anyone else did, because the tenant has renewed a long-term lease, because the landlord and tenant have a business venture together, or simply because the landlord and tenant are friends. Any tenant with favorable below-market lease terms will suffer when the government exercises eminent domain and the tenant is unable to find another property to rent on comparable terms.[9]

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[8] *See, e.g.*, Kieran Nicholson, *Carrying On After Life Carried Off A Resettled Katrina Evacuee Faces Losing Her New Home While Fighting For An Insurance Claim, Still, She's Grateful For Each Day*, DENVER POST, Aug. 29, 2007, at 1 (heavily discounted leases for Hurricane Katrina refugees).

[9] *See, e.g.*, John Warren, *City May Be Building Dredge Site Where Shopping Center Sits*, VIRGINIAN-PILOT, Sept. 28, 2008 (tenants acquired long-term leases for retail stores before area became more popular); Dan O'Kane, *Caddie Improves Kuehne's Game*, TULSA WORLD, June 6, 1999 (golf driving-range had below-market lease from family friend); Maria Galo, *Condo Plan Threatens Cosmetology School Lease*, CHI. TRIBUNE, July 7, 2000 (school had long term lease at below-market rates); Dan Monk, *Another Eminent Domain Fight Gets Ugly*, BUS. COURIER (Cincinnati, Ohio), May 21, 2004 (new lease for chili restaurant would be three times rent from family member at current location).

In such situations, it can easily happen that the non-profit lessee's interest is worth more than the fair market value of the property in question as an undivided unit. The property taken as a whole may have relatively little value because of encumbrances, regulatory violations, or other factors that do not materially diminish the value of the non-profit's leasehold.

Non-profit institutions are particularly likely targets for the sorts of "economic development" takings that this Court ruled to be constitutional in *Kelo v. City of New London*, 545 U.S. 469 (2005). Because non-profits generally do not pay taxes on their property and often produce little in the way of economic development, they make tempting targets for local governments hoping to increase tax revenue or to boost the regional economy. *See Br. for Becket Fund for Religious Liberty as Amicus Curiae Supporting Pet'rs, Kelo v. City of New London*, 545 U.S. 469 (2005), (No. 04-108), 2004 WL 2787141, at *8-11 & n.20 (explaining the special vulnerability of religious non-profits and listing numerous examples where they have been targeted by economic-development takings). For example, numerous churches and other non-profit institutions were condemned in the notorious 1981 *Poletown* case in Detroit, where an entire neighborhood was taken in order to clear the way for a new General Motors

factory.[10] Ilya Somin, *Overcoming Poletown:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1017-18 (2004). Property owned or rented by poor and politically weak individuals is also often targeted for condemnation for transfer to politically influential interest groups. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. 183, 190-203, 267-71 (2007) (describing some of the reasons why this occurs); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Policy Rev. 1 (2003) (discussing history of condemnation of property occupied by the poor and politically weak minority groups).

Property leased by non-profit institutions is also often exempt from taxation, and generally does not produce as much economic development as that used for commercial purposes. *See, e.g., Most Worshipful Grand Lodge of Free & Accepted Masons v. Norred*, 603 So. 2d 996, 1000 (Ala. 1992) (holding that property tax exemption is based on "the *exclusive use* of the property at issue for religious worship, schools, or charity" and that "[g]enerally, who owns the property at issue is unimportant"); *West Brandt*

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[10] This condemnation was upheld by the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

Found., Inc. v. Carper, 652 P.2d 564, 567 (Colo. 1982) ("Eligibility for exemption is determined by examining the use to which the property is put, not the character of the owner").

When property leased by non-profit institutions is condemned, as happens all too often, non-profit organizations need compensation in order to be able to continue their operations elsewhere. And they may not get it if the undivided-fee rule applies. The same is true of numerous small businesses and low-income renters who benefit from below-market rents.

III. THE UNDIVIDED-FEE RULE CONFLICTS WITH BASIC PRINCIPLES OF JUST COMPENSATION EMBEDDED IN THIS COURT'S PRECEDENTS.

"[T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987). The level of compensation is generally determined by "the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

In the present case, the VFW's property right was unquestionably taken by the government and "it is undisputed that the leasehold interest is of great monetary value. *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 746

N.W.2d 536, 543 (Wis. Ct. App. 2008), *rev'd*, 768 N.W.2d 749 (Wis. 2009).[11] Yet the VFW was denied fair market value compensation for the condemnation of its property interest. Indeed, it received no compensation whatsoever. Pet. for Cert. at 1.

The application of the undivided-fee rule to this case undermines two longstanding principles that lie at the core of the Just Compensation Clause. These include the mandate of fair market value compensation and the rule that the Clause is intended to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A. The Undivided-Fee Rule Violates The Rule That Owners Of Condemned Property Are Entitled To Fair Market Value Compensation.

The Supreme Court has repeatedly held that fair market value is the usual method for estimating the compensation due to owners of condemned property. *See, e.g.*, *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984); *United States v. 50 Acres of Land*,

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[11] The Wisconsin Supreme Court questioned elements of the VFW's estimate of the lease's value, but nonetheless "accept[ed] for purposes of our review the VFW's contention that its leasehold interest had value." *City of Milwaukee Post No. 2874 Veterans of Foreign Wars*, 768 N.W.2d at 755 n.10.

469 U.S. 24, 29 (1984); *United States v. Miller*, 317 U.S. 369, 374 (1943); *Olson v. United States*, 292 U.S. 246, 255 (1934). "Deviation from this measure of just compensation has been required only 'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'" *50 Acres of Land*, 469 U.S. at 29 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). No such deviation is necessary in the present case.

Leasehold interests are property and their condemnation by the government must be compensated just like that of other property rights. *See, e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924). "The constitutional provision is addressed to *every* sort of interest the citizen may possess." *Gen. Motors*, 323 U.S. at 378 (emphasis added).

When a leasehold interest is condemned, "[t]he measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew [if any] . . . less the agreed rent which the tenant would pay for such use and occupancy." *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946). In this case, therefore, the appropriate measure of fair market value compensation would have been the value of the remaining years left on the VFW's ninety-nine year term, minus the $1 per year rent.

By applying the undivided-fee rule, the Wisconsin Supreme Court unquestionably denied fair market value compensation to the VFW. Indeed, it denied it any compensation whatsoever.

It is irrelevant that the value of the building considered as an undivided interest might be less than sum of the individual interests that belong to different owners. As Justice Oliver Wendell Holmes emphasized in his classic opinion for this Court in *Boston Chamber of Commerce v. City of Boston*, "the Constitution does not require . . . a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole." 217 U.S. 189, 195 (1910). Courts must assess the value of the interest taken from each individual separately because the Just Compensation Clause "deals with persons, not with tracts of land." *Id.*

B. The Undivided-Fee Rule Forces Individual Property Owners To Bear Public Burdens That Should Be Borne By The Public As A Whole.

The undivided-fee rule also violates this Court's Just Compensation Clause doctrine by "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court has consistently "emphasized [the] role" of the Takings Clause in enforcing this principle. *Lingle v. Chevron, Inc.*, 544 U.S. 528, 537 (2005); *see*

also Palozzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (noting that "the purpose of the Takings Clause . . . is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Armstrong v. United States,* 364 U.S. at 49)).

The application of the undivided-fee rule to cases such as the VFW's is a particularly egregious violation of the principle that lies at the heart of "the purpose of the Takings Clause." *Palozzolo*, 538 U.S. at 617-18. In such cases, owners of leasehold interests are forced to bear a grossly disproportionate share of the burden of the public project facilitated by condemnation, while receiving little or no compensation for their losses. In the VFW's case, there was no compensation at all. The VFW lost some fifty-nine years of a valuable leasehold interest whose value the Wisconsin Court of Appeals estimated at roughly $300,000. Pet. for Cert. at 8-9.

Under the ruling below, therefore, the VFW will be forced to shoulder a substantial part of the cost of the public use for which its property was condemned and in exchange will receive literally nothing. Other similarly situated lessees find themselves in the same position. They too bear a burden that the Just Compensation Clause was created to spread to the public as a whole.

IV. THE COURT SHOULD ALSO GRANT A WRIT OF CERTIORARI ON THE PETITIONER'S DUE PROCESS CLAUSE CLAIM.

The Wisconsin Supreme Court ruled that the VFW had no right to present any evidence to the jury on the value of its property interest that the government had condemned. This ruling conflicts with this Court's precedents and creates a potential split with United States Court of Appeals for the Fifth Circuit.

A. The Due Process Clause Gives Property Owners The Right To Present Evidence Of The Value Of Their Property In Eminent Domain Proceedings.

This Court has emphasized that "[t]he right to present evidence is . . . essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969). That is especially true in situations "where government action seriously injures an individual, and the reasonableness of the action depends on fact findings." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). In such cases, "the evidence used to prove the Government's case must be disclosed to the individual so that he has *an opportunity to show that it is untrue.*" *Id.* (emphasis added). In this case, the government's action in refusing to pay compensation undoubtedly "seriously injured" the VFW, and the reasonableness of that action depended at least in part on factual findings regarding the value of the VFW's interest.

Yet the VFW had no "opportunity to show" that the government's claims were "untrue" because Wisconsin courts prevented it from presenting any evidence to contest that of the government. *Id.*

This Court has held that the Due Process Clause applies to eminent domain compensation determinations, emphasizing that "it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." *Bragg v. Weaver*, 251 U.S. 57, 59 (1919). The same due process requirements that apply to other litigation apply to Just Compensation Clause cases. Thus, the Wisconsin Supreme Court's decision in the present case runs counter to this Court's interpretation of the Due Process Clause.

B. The Wisconsin Supreme Court Creates A Split With The Fifth Circuit.

The Wisconsin Supreme Court's decision on the due process issue creates a split with the Fifth Circuit Court of Appeals. In *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954), the Fifth Circuit invalidated a condemnation proceeding in which the government sought to condemn 236 properties at once and did not allow each individual owner to present evidence of the value of his particular property. *Id.* at 151, 154-57. The Fifth Circuit held that "the individual landowner's Constitutional right to due process and just compensation" requires an opportunity to present evidence of the value of his or her specific property.

Id. at 156; *cf. United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1314 (11th Cir. 2009) ("A court may violate constitutional due process if it chooses an adjudication mechanism designed to preclude landowners from producing relevant evidence opposing that offered by the Government.").

The facts of the present case are actually more egregious than those of *Gwathmey*. The *Gwathmey* property owners at least were allowed to present some generalized evidence of value that applied to all 200 tracts. *See Gwathmey*, 557 F.2d at 151-52 (discussing evidence presented by owners' attorneys). By contrast, the VFW was not permitted to present any evidence of the value of its property whatsoever. Pet. for Cert. at 28.

The grant of a writ of certiorari is particularly appropriate when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort *or of a United States court of appeals*." SUP. CT. R. 10(b) (emphasis added). The Due Process Clause issue in this case qualifies.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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